WANG HSIUH LING

v.

DR. PETER NG & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
LIM BENG CHOON J
[CIVIL SUIT NO. S7-25-153-88]
30 APRIL 1991

DAMAGES: *Professional singer - Injury - Medical treatment - Allergic drug - Rashes and pigmentation on lips - Pre-trial loss of earnings awarded under general damages - Disputed - Not claimed under head of special damages - Pleaded in affidavit - Effect of - Bound by pleadings - No evidence that singing contract breached as a result of injury - Pain and suffering - Loss of amenities - Disfigurement to face - Impaired social life.*

The plaintiff W who was a professional singer alleged medical negligence on the part of the 1st defendant, D1, in his medical treatment of her on 19 June 1988 (the said date) for cough and sore throat, and against the 2nd defendant D2, for vicarious liability as D1's employer.

W alleged that on the said date, D1 had prescribed a drug for her which belonged to a group of drugs which she was allergic to. She stated that D2 knew of her allergy and that D1 knew or ought to have known of her allergy as it was stated in her medical card which was kept by D2. W contended that as a result of taking of the drug, she suffered from rashes on her lips, the inside of her mouth, her thighs and her legs. Although the swelling subsided after a month, there was residual greyish pigmentation on her mouth until 1989. W alleged that as a result of this negligence, she was not able to sing and that she could not continue with her singing career because of her facial disfigurement.

It was also contended by W that as a result of the injury suffered by her, she was unable to perform a singing contract in Japan. W claimed damages for loss of income caused as a breach of contract and for loss of income from a singing career.

On 22 October 1990, the Senior Assistant Registrar, SAR, awarded W special damages of RM470, and general damages comprising RM2,000 for pain and suffering and RM35,586 for loss of earnings resulting from W's inability to perform in Japan.

The defendants appealed against the SAR's order, disputing the amount of general damages arguing that:

(a) as pre-trial losses were never pleaded as an item under special damages in W's statement of claim, she should not have been awarded the loss of pre-trial earnings under the head of general damage;

(b) there was evidence to show that W took it upon herself to terminate the agreement to sing in Japan - as a result, she did not suffer any loss as she was fully paid for her singing engagement with S until 20 July 1988 and

(c) W did not submit at the trial before the SAR any loss of future earnings presumably because her Counsel accepted that the purported loss of earnings derived from her signing contract in Japan was actually pre-trial loss of earnings.

W's Counsel submitted that W had pleaded for loss of future earnings in relation to the Japanese contract in her statement of claim as she had suffered pigmentation around her lips up to 1989.

Held:

[1] If W was contractually bound to perform in the Japanese night club from 1 July 1988 for a period of 4 to 6 months, the loss of earnings are pre-trial loss of earnings. As such it must be pleaded under the head of special damages, particularised and proved. Consequently, the SAR should not have awarded this sum as general damages.

[2] The contents of an affidavit are in the nature of evidence and not pleadings; if in W's pleading she had failed to plead her pre-trial loss of earnings, she is bound by her pleadings. Her statement of claim cannot be amended by what she said in her affidavit. The 3 items contained in her affidavit must be ignored as they do not form part of her case as set out in the pleadings.

[3] There is no evidence that W had entered into a contract with the Japanese night club to perform there at a fixed monthly salary; the only contract she had executed was between herself and her overseas agent.

[4] As W admitted that after her injury she stayed at home to assist her husband in his business, it is clear that W did not depend on her earnings as a professional singer to survive. She did so to enhance her singing career and to earn money for herself.

[5] On a balance of probabilities, W was fully paid for her services with S and her contract with the Japanese night club did not materialise because she was still working at S.

[6] Bearing in mind the fact that W was a professional singer and that any disfigurement to her face would have caused her great anxiety and impaired her social life, the damages for pain and suffering and loss of amenities was increased to RM4,000.

[Special damages of RM470 awarded; RM4,000 for pain and suffering and loss of amenities; SAR's award for pre-trial loss of earnings revoked.]

Cases referred to:

British Transport Commission v. Gourley [1955] 3 All ER 796
Chow Yoong Hong v. Tai Chet Siang [1959] 2 PC 113
Domsalta & Anor. v. Borr (Trading as A.B. Construction & Ors.) [1969] 3 All ER 487
Ilkiw v. Samuels [1963] 2 All ER 879
Low Ah Tow v. Yusof bin Kayab [1954] MLJ 112
Low Kwee Swee v. Chu Teck Tong [1962] MLJ LXXXIII
Ngooi Ku Siong & Anor. v. Aidi Abdullah [1984] 1 CLJ (Rep) 294
Shearman v. Folland [1950] 1 All ER 976
Tan Lin Siew & Anor. v. Syed Hussein bin Alwi [1987] CLJ (Rep) 362
Watson v. Powles [1967] 3 All ER 721

Legislation referred to:

Rules of the High Court 1980, O. 14 r. 1

For the plaintiff - Pertaf Singh; M/s. Lim, Sulaiman & Co.
For the defendants - Andrew Ng; M/s. Yeo & Yeo

JUDGMENT

Lim Beng Choon J:

The plaintiff instituted this suit against the 1st and 2nd defendants on 19 September 1988 alleging medical negligence on the part of the 1st defendant in treating her on 19 June 1988 for a simple ailment of cough and sore throat and the 2nd defendant, being the employer of the 1st defendant, was alleged to be vicariously liable for the negligence of the 1st defendant.

Thereafter on 16 November 1988 the plaintiff applied by way of summons-in-chambers for leave to enter final judgment against the defendants pursuant O. 14 r. 1 of the Rules of the High Court 1980. The defendants filed their joint statement of defence on 18 November 1988 after having entered appearance. The O. 14 application was heard by the Senior Assistant Registrar (SAR) on 21 March 1989 and she reserved judgment until 28 March when she granted leave to the plaintiff to enter interlocutory judgment with costs and postponed the assessment of the quantum of damages to a later date. Upon the application of the plaintiff, the SAR fixed 28 July 1989 for the hearing of assessment of the quantum of damages. Prior to the fixing of the date of hearing the plaintiff had filed an affidavit on 21 June 1989 setting out the various heads of damages on which she would base her claims. I shall have more to say regarding this affidavit presently. The defendants filed an affidavit in reply dated 10 August 1989 stating *inter alia* that they denied the assertions of the plaintiff as set out in her affidavit and applied to cross-examine the plaintiff on her affidavit. The defendants also stated that they would be calling witnesses to sustain their defence and needed time to subpoena the witnesses. The trial of assessment of damages was therefore postponed to 11 December 1989.

In both her affidavit and oral evidence the plaintiff asserted that she was a professional night-club singer and on 21 April 1988 she was engaged as a part-time singer at Shangrila Nite Club. She was not paid a fixed salary but she received "red packets" amounting to RM4,000 to RM5,000 a month. She was prepared to sing at the said Nite Club just to help them out when they were short of singers. At the same time the plaintiff's overseas agent, had succeeded in persuading a night club known as Yamashro Onsan Kaga-shi Ishikawa-ken Japan (hereinafter referred to as "the Japanese night club") to engage her as a singer and she was supposed to commence performance on 1 July 1988 at a salary of 300,000 yen per month for a period of 4 to 6 months. The plaintiff had executed a contract not with the Japanese night club but with her overseas agent which contained one important clause namely clause 9 which is in these terms:

> In the event that any of the above provisions (of the contract) is breach (*sic*) by Party B (the plaintiff), Party B shall voluntarily compensate a sum of NT.200,000 to Party A (the overseas agent) without any dispute and shall forego all rights of appeal. (Words within parentheses are mine).

The plaintiff also said when she was treated by the 1st defendant for the minor ailment of cough and sore throat on 19 June 1988 it was already in her medical card kept by the 2nd defendant clinic that she was allergic to a drug called *sulphonamides* and the 1st defendant who knew or ought to know about her allergy still administered her with a drug known as *bactrim* which comes under the same group drugs called *suphamenthaxzsole/sulphonamides.* Upon taking the *bactrim* the plaintiff suffered from rashes on the lips, inside the mouth and on her thighs and legs. She went back to see the 1st defendant who immediately stopped her from taking *bactrim* and gave her some other medication. Not satisfied with the treatment given to her by the 1st defendant, the plaintiff went to see one Dr. Chew Hon Nam, a consultant dermatologist on 9 July 1988 who diagnosed her as suffering from fixed drug eruption due to *bactrim.* Dr. Chew was later called as a witness for the defendants and he tendered a report made by him on 3 August 1988 about the plaintiff's condition. The report, Exhibit D3, stated that clinical examination revealed violaceous patches over the lips which were slightly swollen. There were discrete *erythematous papules* (rashes) over the anterior thighs and legs. On 21 July 1988, a review found that the lesions over the lips, thighs and legs had settled. The swelling over the lips had subsided but there was residual greyish pigmentation over the left upper lip and area adjacent to the vermilion border of the lower

lip. The report went on to state that the actue episode was cured but the residual pigmentation would persist for a variable period of few months before it would fade off completely without the need of any specific or special treatment. Reverting to the plaintiff's oral evidence she claimed that she was not able to sing and she stopped singing since the date when she took the drug *bactrim* that is on 19 June 1988. She felt inferior and lost confidence in herself to continue with her singing career because of her facial disfigurement. Since she stopped singing she stayed at home in 1989 she helped her husband, who is a Malaysian, in his business. In her affidavit affirmed on 21 June 1989 she claimed various items of special damages amongst which were these three items:

(v) Loss caused by breach of contract (4-6 months) (1 July 1988 to 1 December 1988) - RM20,000

(vi) Loss of Income cause as a breach of contract (4-6 months) (1 July 1988 - 1 December 1988) - RM36,000

(vii) Loss of income from singing career at RM5,000 (per) month (that is, from 1 January 1989 - 1 June 1989) - RM24,000

In her evidence she maintained that but for the injury suffered by her she would have been able to perform in the Japanese night club commencing from 1 July 1988 at a monthly income of 300,000 yen per month (which based on the exchange rate at the material time would come to RM5,931 per month). Her performance with the Japanese night club was for a period of 4 to 6 months which would give her an income of about RM36,000. She admitted, however, that although she had breached the contract which she entered into with her overseas agent she had never paid any compensation to the said agent although the said agent had spoken to her on the telephone about the compensation of N.T.200,000 (which based on the exchange rate at the material time would come to RM20,000). As regards to her loss of income from 1 January 1989 to 1 June 1989 as stated in her affidavit the plaintiff probably referred to her inability to continue to sing in Shangrila Nite Club but she had not established that she had received any offer to sing at the said club in 1989.

The defendants called one Mdm. Chow Yoke Yun, the administrative cum personnel manageress of Shangrils Nite Club (DW1) to testify. DW1 began her testimony by producing a letter dated 12 August 1989 (D1) written by her to the solicitors of the defendants. I need only reproduce so much of the contents of that letter that would be relevant to the present appeal and they are as follows:

Re: Wang Hsiuh Ling (F)

4. We wish to state that we do not have record of the real names of our temporary singers as they are in the habit of providing us with their artist names.

5. We have reason to believe that from our record the artist's name of Chan Wan Hua is used by the subject above. The said Chan Wan Hua began employment on 21 April 1988 and had the following income from us.

	Basic	**Tips-Sharing**
1st month	RM1,800	RM 512.50
2nd month	RM1,800	RM1,322.50
3rd month	RM2,000	RM 450.00
	RM5,800	RM2,285.00

6. The above information is given strictly upon your undertaking to use it only in the present Court proceedings (Civil Suit No. S7-25-153-88) and not in any other way.

She then went on to say that the plaintiff commenced work as a singer in her club in mid April 1988 and ceased working sometime in July 1988. When asked to explain para. 5 of D1, DW1 said that temporary singers usually gave their stage names and not their real names as appeared in their passports. DW1 also said that it was she who paid the basic salary and sharing allowance to the plaintiff. Payment was made by cheque made out in plaintiff's stage name which was "Chan Wan Hua". The plaintiff did not subscribe to EPF or SOCSO because she had no work permit from the Immigration Department. There was also no written contract executed between the plaintiff and Shangrila Nite Club. Under cross-examination DW1 said that Chan Wan Hua herself received the monthly cheques and her signature, which was approved by the said club, apparently appeared in the acknowledgment record. DW1 also asserted that it was the plaintiff who personally went to the Shangrila Nite Club to ask for work and DW1 saw her personally. Under reexamination DW1 again reiterated that the plaintiff and Chan Wan Hua was one and the same person. While the plaintiff's real name was Wang Hsui Ling, her stage name was Chan Wan Hua.

In fact when the present case was instituted the plaintiff went to see DW1 twice but she did not say why would the plaintiff have visited her as no one bothered to ask DW1 for the reason. DW1 said she knew the plaintiff by sight. DW1 then produced another letter dated 16 August 1989 written by her (D2) to the solicitors of the defendants merely to correct the monthly earnings of the plaintiff which were as follows:

	Basic	**Tips-sharing**
1st month	RM1,800	RM1,935.00
2nd month	RM1,800	RM1,322.50
3rd month	RM2,200	RM1,710.00
	RM5,800	RM4,967.50

The second witness for the defendants was the consultant dermatologist DW2 who merely confirmed what he had stated in his report dated 3 August 1988 (D3). He, however, did say that the plaintiff never complained about any trouble with her voice - she spoke normally. Indeed, so said DW2, no other patient facing the same treatment could or would have complained about her voice being affected. Under cross-examination DW2 reiterated that throughout his treatment of the plaintiff her voice was the same. On 29 March 1989 the pigmentation had not yet disappeared. He could not say when it would disappear as this depended on the individual. DW2 also said that when the plaintiff went and saw him, she was a bit anxious concerning her face. On re-examination DW2 emphasised that there was no other side effect except the pigmentation.

After the trial on the assessment of damages Counsel for the respective parties agreed to file in written submissions. They did so accordingly and on 22 October 1990 the SAR made the following awards:

1. Special damages RM470
2. General damages
   (1) Pain and suffering RM2,000
   (2) Loss of earnings RM35,586
3. Total damages RM38,056

4. Special damages to carry interest at 4% p.a. as from the date of injury to date of judgment and the general damages to carry interest at 8% p.a. from the date of judgment to the date of realisation. Costs were ordered to be taxed.

Now it is clear from the submission made to me that the defendants were not satisfied with the general damages awarded by the SAR to the plaintiff although they were not disputing the special damages awarded by the SAR. It is much regrettable that the SAR had not given her grounds upon which she arrived at her conclusion in granting the awards on damages to the plaintiff. That being the case I am therefore obliged to go into the matter *de novo* - see the Privy Council case of *Chow Yoong Hong v. Tai Chet Siang* [1959] 2 PCC 113 at 114 Malaysia.

For consistency I shall refer the appellant as the defendants and the respondent as the plaintiff. Counsel for the defendants in his submission stated that he was raising only one issue and that was related to the award for general damages in which the SAR had awarded the sum of RM2,000 for pain and suffering and the sum of RM535,586 for loss of earnings. Briefly and if I have not misunderstood him, Counsel argued firstly that pre-trial losses were never pleaded in the statement of claim of the plaintiff. Secondly the singing engagement of plaintiff with Shangrila Nite Club ended on 20 July 1988. As the singing engagement of plaintiff with the Japanese night club was to commence on 1 July 1988 the only conclusion that one could reach was that the plaintiff took upon herself to terminate the agreement to sing in Japan. In any case she suffered no loss as she was fully paid for her singing engagement with Shangrila Nite Club up to 20 July 1988. Thirdly and more importantly Counsel for the plaintiff did not submit at the trial before the SAR any loss of future earnings presumably because Counsel accepted that the purported loss of earnings derived from her prospective singing engagement in the Japan night club was actually pre-trial loss of earnings. Such loss could only come under the head of special damages and not general damages and such loss was never pleaded.

Counsel for the plaintiff on the other hand submitted that the plaintiff had pleaded in her statement of claim for special damages relation to the contract dated 1 August 1988. The plaintiff suffered pigmentation around her lips up to 1989. Shangrila Nite Club did not pay the plaintiff anything. What was paid by the said club was the salaries and tips-sharing to one called Chan Wan Hua. The payments were by cheques which the plaintiff never received.

In the light of the submissions of the respective Counsel it would appear that the only issue that I have to decide is whether the SAR was right in awarding the sum of RM35,586 as general damages.

Now general damages is what the law implies (per Lord Goddard in *British Transport Commission v. Gourley* [1955] 3 All ER 796 at 804) and in assessing general damages three elements are to be considered: (a) pain and suffering (b) loss of future earnings and (c) the disadvantage arising from disablement apart from loss of earning power. While element (b) is related to probable earnings of the injured person, elements (a) and (c) are not so related (see *Low Ah Tow v. Yusof bin Kayab* [1954] MLJ 112). General damage is defined (if it can be classified as a definition) by Asquith LJ in *Shearman v. Folland* [1950] 1 All ER 976 at 981 in this way:

> All damages which up to the time of hearing have not yet crystallised in actual disbursement but are still prospective are general damages.

On the other hand special damages is monetary loss which the plaintiff has suffered and this consists of loss of earnings and out-of-pocket expenses incurred by the victim (see the

Gourley case cited above). Thus a plaintiff who as a result of injuries is disabled and is deprived of his income is entitled to claim the lost income and profits **up to the date of the trial** as special damages and if such loss continues he is entitled to an award for the future loss of earnings and profits under the general damages (see *Watson v. Powles* [1967] 3 All ER 721.)

It is trite law that special damage must be pleaded, particularised, and of course proved. Thus it was stated in *Ilkiw v. Samuels* [1963] 2 All ER 879 at 891 that:

> As regards the question of damages, I would put it in this way. Special damage in the sense of a monetary loss which the plaintiff has sustained up to the date of the trial must be pleaded and particularised. In this case special damages were so pleaded and particularised at the sum of £77 odd. Shortly before the trial, the special damage (as so particularised) was agreed at £77 by letter. *In my view, it is plain law - so plain that there appears to be no direct authority, because everyone has accepted it as being the law for the last hundred years - that one can recover in an action only special damage which has been pleaded, and, of course, proved.* In the present case, evidence was called at the trial the effect of which was that the plaintiff had sustained special damage of a very much larger sum, amounting, I think it would work out at, to something like £2,000 - at any rate, a very much larger sum than £77. This was not pleaded, and no application to amend the statement of claim to plead it could be made because of the agreement already arrived at the sum of £77 for special damage. *The evidence about the loss of earnings in excess of £77 was admissible, not as proof of special damage (which had not been pleaded) but as a guide to what the future loss of earnings of the plaintiff might be.* (Emphasis is mine)

This observation of Lord Diplock LJ in the *Ilkiw* case was cited with approval by our Supreme Court in the case of *Tan Lin Siew & Anor. v. Syed Hussein bin Alwi* [1987] CLJ (Rep) 362. Again in *Ngooi Ku Siong & Anor. v. Aidi Abdullah* [1984] 1 CLJ (Rep) 294 Syed Agil Barakba said at p. 298:

> Special damages on the other hand have to be **specifically pleaded** and strictly proved. They refer to past expenses and loss of earnings. The exact loss must be pleaded where the precise amount of item has become clear before the trial. Loss of future earnings or post-trial loss differs from **pre-trial loss which comes under special damages.** The reason that special damages have to be specifically pleaded is in order to comply with its object which is crystallize the issue and to put the defendants on their guard and tell them what they have to meet when the case comes on trial. (Emphasis is mine).

Reverting to the present appeal, since the main contention of the Counsel for the defendant is that as the plaintiff had failed to plead loss of pre-trial earnings as an item in her claim for special damages she should not be awarded the losses purported to be suffered by her under the head of general damages. It is appropriate at this juncture to set out in full the pleadings of the plaintiff relating to her claim for damages and they are as follows:

Particulars of Special Damages

(a) Transport expenses	-	RM 100
(b) Medical fees to date (and still continuing)	-	RM 237
(c) Loss arising from breach of singing contract (contract dated 1 July 1988)	-	RM20,000
(d) Special Report	-	RM 300
Total:	-	RM20,637

As a result of the negligence the plaintiff has suffered loss and damage wherefore the plaintiff claims:

(i) Special damages of RM20,637 together with interest at 8% from date of injury till date of full settlement.

(ii) General damages.

(iii) Interest on the decretal sum at 8% per annum from date of judgment till date of realisation.

It must be borne in mind that for special damages, the SAR had awarded a sum of RM470 and Counsel for the respective parties are not disputing this figure although I am not sure how the SAR arrived at this figure. However that may be it is clear that in awarding the sum of RM35,586 as general damages the SAR took into account the loss of earnings the plaintiff had suffered in failing to comply with her agreement to perform at the Japanese night club for which she would have earned a sum of 300,000 yen (or RM5,931) per month for six months which would come to RM35,586 (RM5,931) multiplied by 6. The SAR had refused to make any award for the plaintiff's claim for loss arising from her breach of singing contract dated 1 July 1988 in the sum of RM20,000 as special damages. I concur with her rejection of this claim as there is no sufficient evidence at all that the plaintiff had or would have to pay this amount. Be that as it may I am still faced with this question: Is the SAR right in awarding the sum of RM35,586 as general damages in respect of her loss of earnings arising from the plaintiff's inability to perform in the Japanese night club? My answer to this question is as follows.

In the first place the plaintiff was purported to be contractually bound to perform in the Japanese night club commencing from 1 July 1988 for a period of 4 to 6 months. There can be no doubt that the SAR assumed that the plaintiff would be performing for 6 months that is to say up till 31 December 1988. That being the case, the loss of such earnings is, to my mind, a loss of earnings prior to the trial of this case. In other words her claim is a claim of loss of earnings which crystallised prior to the date of the trial of the case which took place on 28 February 1990. In short it is a claim for pre-trial loss of earnings which must be pleaded under the head of special damages and particularised. This the plaintiff had failed to do. On this ground alone the SAR should not have awarded the aforestated sum as general damages.

In arriving at this conclusion I have not overlooked the plaintiff's affidavit affirmed on 21 June 1989 in which she gave a summary of her various claims amongst which were the three claims which I had reproduced earlier. The contents of an affidavit are in the nature of evidence and not pleadings. If in the plaintiff's pleadings she had failed to plead her pre-trial loss of earnings she is bound by her pleadings. Her statement of claim cannot be said to have been amended by what she said in her affidavit. In fact the three items contained in the affidavit must be ignored as they do not form part of her case as set out in the pleadings.

In the second place there is absolutely no evidence that the plaintiff had entered into a contract with the Japanese night club to perform there on a fixed monthly salary of 300,000 yen. The only contract she had executed was the contract written in Chinese (Exhibit NHL2 annexed to the plaintiff's affidavit - encl. 13). The contract written in Chinese was made between the plaintiff and her overseas agent, one Yan Hong Company. It is necessary to reproduce some of the terms of the said contract (hereinafter referred to as 'the Yan Hong contract' which had been translated by a certified Chinese interpreter of this Court) insofar as they are relevant to the award in question made by the SAR and the said terms are these:

This contract is made between Yau Hong Company of Party A and Wong Hsiuh Ling of Party B (stage name as Wong Ling Ling) whereby it is agreed as follows:

1. Party A is fully authorised by Party B to arrange for overseas performances and to sign overseas contracts on her behalf.

2. Countries agreed upon and conditions:

   (1) Hong Kong

   (2) Thailand

   (3) Singapore

   (4) Malaysia

   (5) Indonesia

   (6) Philippines

   (7) Japan (300 thousand Japanese Yen per month for a period of 4 to 6 months).

3. Party B shall not give any excuses to vary the overseas schedule that Party A had arranged and must perform accordingly to the schedule till completion, after which the contract will be deemed as terminated.

5. Party A shall be responsible for and shall give assurance to the wages for the performance arranged. However, Party B shall abide to the rules, working regulations of the said country and shall behave herself, otherwise, Party B shall be held responsible.

7. Upon signing of this contract, Party B shall not execute any contract with any other entertainment organisation.

9. (relating to compensation payable by plaintiff which has been reproduced earlier).

10. This contract is put up into two sets and each party to hold a set, effective from the date of signing, that is, 10 February 1988.

Place of performance: Yamashiro Onsen,
Kaga-shi, Ishikawa-
ken, Japan.

Date of performance: 1 July 1988.

Bearing in mind that the Yau Hong contract was executed on 10 February 1988 one would expect Yau Hong Company to finalise an agreement with the Japanese night club and execute it on behalf of the plaintiff within a month or two and sent a copy to the plaintiff. It is therefore amazing that Yau Hong Company had not taken any steps to finalise the agreement with the Japanese night club (the Japanese contract) particularly when the plaintiff was supposed to abide by the rules and working regulations of the Japanese Government and also the Japanese night club had certain rules relating to the behaviour expected of the plaintiff and the period of which the plaintiff was supposed to sing per day or night and the period when she need not sing. Without this Japanese contract one is left to speculate whether Yau Hong Company had succeeded in executing the Japanese contract on behalf of the plaintiff on or before 19 June 1988 when the plaintiff was treated by the 1st defendant. More surprisingly is that the plaintiff herself had not taken any steps to inquire from Yau Hong Company about the Japanese contract and instead preferred to take up employment with Shangrila Nite Club as a temporary singer. Under the circumstances it is more probable that Yau Hong had only made an informal approach to the Japanese night club and the latter showed an interest in engaging the plaintiff subject to a contract to be executed later. Yau

Hong Company however failed to obtain a firm contract from the Japanese night for reasons best known to the two parties. It is for this reason that Yau Hong Company did not press the plaintiff or institute judicial action for compensation when the plaintiff failed to take up the employment with the Japanese night club on 1 July 1988.

Another point that should be taken into consideration is that the plaintiff was not a spinster - she was married to a Malaysian businessman. Indeed in her oral evidence she admitted that after sustaining injury she stayed at home and helped her husband in his business. It follows therefore the plaintiff did not depend on her earnings as a professional singer to survive. She did so to enhance her singing career and to earn money for herself. Because of her ambition she therefore approached Shangrila Nite Club for a temporary post as a singer on 21 April 1988 since she had not yet heard from Yau Hong Company as to whether the Japanese contract had been finalised. She preferred to use another stage name *viz.*, Chan Wan Hua instead of her real name or her usual stage name of Wong Ling Ling because in Yau Hong contract she was not supposed to execute any contract with any entertainment organisation and should she breach the term she would have to pay compensation of RM20,000 to Yau Hong Company. In support of the proposition that she approached Shangrila Nite Club for a job as a temporary singer we have the evidence of the Administrative cum Personal Manageress of the said club, DW1 who said it was the plaintiff who personally applied for a temporary post as a temporary singer. DW1 not only identified the plaintiff at the trial but she also said that the plaintiff went to see her twice after the plaintiff had filed the suit against the defendants. More importantly DW1 clearly said that in her singing engagement with Shangrila Nite Club she used the name Chan Wan Hua as her stage name. Furthermore the plaintiff was fully paid for her services from 21 April 1988 until she left on 20 July 1988. It is to be noted that DW1 is an independent witness - she has no interest in the case. Her evidence should be taken into consideration instead of being completely ignored which the SAR seemed to have done. However that may be I must also take into consideration the plaintiff's explanation relating to the Shangrila nite club's failure to pay for her services and that she never used the name Chan Wan Hua as her stage name whilst performing in the said club. It was pointed out to the SAR that in her medical card kept by the 1st defendant the name stated therein was the real name of the plaintiff that is to say "Wong Hsiuh Ling, Shangrila" and not Chan Wan Hua. My answer to such contention is that when one goes to see a doctor at his clinic one must give one's real name and not alias or stage name together with the address at which the patient could be contacted. This is because should the doctor dispense dangerous or prohibited drug to the patient he must be able to explain to the Ministry of Health the reason why he administered such drug and to give the name and address of the patient should officers of the said Ministry want to investigate the matter. The plaintiff therefore had no choice but to give her real name. The second contention of the plaintiff was that all the payments purportedly made to her were by cheques and the name stated therein was Chan Wan Hua and not her real name or her stage name of Wong Ling Ling as stated in the Yau Hong contract. Again my answer to that is simple. Anyone can open a current account in any bank under any name he chooses so long as he has the recommendation from his employer that he is known by that name. As to the argument that the plaintiff did not receive the cheques or the payment there is no sufficient evidence to support such a contention. Indeed DW3 said that she personally paid the plaintiff. Upon a careful scrutiny of the evidence on the whole I cannot see any reason for the SAR's failure to appreciate that on a balance of probabilities the plaintiff was fully paid for her services with Shangrila

Nite Club and that her contract with the Japanese night club did not materialise simply because (apart from what I have said earlier) since she was supposed to commence her singing engagement with the Japanese night club on 1 July 1988, she was still working for Shangrila Nite Club until 20 July 1988.

I must mention that in support of his contention that the SAR was right in awarding the sum of RM35,586 as general damages for the loss of earnings arising from the plaintiff's inability to perform in Japanese night club, Counsel for the plaintiff drew my attention to the case of *Domsalta and Anor. v. Borr (Trading as A.B. Construction & Ors.*) [1969] 3 All ER 487. In that case the plaintiff had accepted the offer of a 3-year contract to work as a steel erector in Nigeria before the accident but as a result of the injuries sustained by him he had to refuse the offer. In his statement of claim this was pleaded and it was claimed that his special damage and loss of earnings should be assessed by comparison with this work and the opportunities it would afford the plaintiff. At the trial, however, the plaintiff led, without objection from the defendants, evidence of his studies and academic qualifications in steel erecting, and his eventual intention, with his father's financial assistance to set up in business as a steel erector on his own account. This fact was never pleaded. On this evidence the trial Judge found that the plaintiff would have earned large sums of money in his own business and awarded him £6,500 general damages. It must be noted that in granting the award, the trial Judge took into consideration that the plaintiff had lost the prospect of earning large sums of money arising from an opportunity to establish his own business in steel erecting some time in the future. Such a claim rightly falls within the head of general damages and the details giving rise to general damages are not normally required to be pleaded. The claim for general damages is averred in general terms in the pleadings - see *Ngooi Ku Siong* case (*supra*) at p. 298. Nevertheless at the hearing in the Court of Appeal, the appeal Judges held that when a plaintiff was relying on special circumstances to enhance the quantum of general damages, the facts giving rise to those circumstances must still be pleaded. Thus Edward Davies LJ said at p. 492 of the reported case:

> The statement of claim does not begin to suggest anything of the sort. Should it have done so? In my judgment, it should. *Where it is proposed to allege that there are any special circumstances which will probably lead the plaintiff to sustain in the future losses over and above those which in the ordinary way would reasonably be expected to flow from the accident, I hold that those special circumstances should be pleaded.* This duty cannot be neglected simply by saying: "those losses relate to the future; they are therefore part of the general damages and accordingly need not be pleaded." So to hold would be to ignore the basic object of pleadings, which is, to crystallise the issues and so enable both parties to prepare for trial, and, indeed, to decide whether they should go for trial at all or rather seek to compromise their differences, and, if they fail to do that, to guide the defendant on the important matter of payment into Court (Emphasis is mine).

and in p. 493 His Lordship went on to say:

> Accordingly, if a plaintiff has suffered damage of a kind which is not the necessary and immediate consequence of the wrongful act, he must warn the defendant in the pleadings that the compensation claimed will extend to this damage, thus showing the defendant the case he has to meet and assisting him in computing a payment into Court. The limits of this requirement are not dictated by any preconceived notions of what is general or special damage but by the circumstances of the particular case. 'The question to be decided does not depend on words, but is one of substance'. By adverting to the plaintiff's intention to set up in business on his own account, there was being introduced into the case an entirely new element which had received no adumbration at all in the statement of claim. For that reason, in my judgment, the plaintiff was going outside his pleading, and objection might properly have been

taken to the leading of such evidence. The objection, however, was not made, and accordingly it is not right, in my judgment, for this Court to say it will not have regard to such evidence as was called in support of this new, unpleaded matter; but that in no way relieves the Court from the duty of carefully assessing such evidence as was adduced in support of this entirely novel allegation.

To my mind the *Domsalla* case cited above does no more than to suggest that a plaintiff is entitled to claim for general damages but if the plaintiff is relying on special circumstances to support his claim for general damages those circumstances must be pleaded. However even if those special circumstances have not been pleaded nevertheless if evidence has been admitted without objection to establish those circumstances, the evidence can be taken into consideration to enhance the quantum of general damages which the plaintiff is entitled to in any event.

In the present case we are not talking of general damages but pre-trial loss of earnings which comes under special damages for which there is no legal presumption that the plaintiff is entitled to such damages. The circumstances giving rise to such a loss must, and I repeat must, be pleaded, particularised and proved - see *Ilkiw v. Samuels* (*supra*) and the two local cases *Ngooi Ku Siong v. Aidi Abdullah* and *Tan Lin Siew v. Syed Hussein bin Ali* cited earlier. The *Domsalla's* case is therefore of no assistance to the plaintiff's case.

Finally as stated earlier I am not fully satisfied that the plaintiff had positively executed a contract with the Japanese night club in which she was supposed to perform.

As this appeal is against the decision of the SAR in her awarding of damages and costs I can also deal with the award made by the SAR for pain and suffering. Under this head she awarded a sum of RM2,000 presumably based on the authority of *Low Kwee Swee v. Chu Teck Tong* [1962] MLJ LXXXIII which case was cited by the defendant's Counsel at the trial. The SAR had however overlooked that although a sum of RM2,000 was awarded for pain and suffering the learned Judge in that case also awarded a sum of RM10,000 for **loss of amenities** and potential earning capacity. Furthermore that case was decided nearly 30 years ago and there has been a significant change in the value of money. Bearing in mind that the plaintiff was at the material time a professional singer and performer, any disfigurement to her face would naturally cause her great anxiety. It must also be noted that the plaintiff had suffered lesions inside her mouth, around her swollen lips and over her thighs and legs for over one month (see medical report of DW2 dated 3 August 1988). During that period she was not able to take her normal meals and needless to say she would not with her disfigurement be able to step outside her door to meet friends and enjoy a normal life. Even on 21 July 1987 when the lesions had settled and the swelling over her lips had subsided the residual grey pigmentation around her lips still caused her great anxiety and impaired her social life. For these reasons the award under the head of pain and suffering and loss of amenities should be increased to RM4,000.

To summarise the awards made in this appeal, they are as follows:

(i) Special damages - RM 470

(ii) Pain and suffering and loss of amenities - RM4,000

(iii) The award granted by the SAR for the loss of earnings in the sum of RM38,056 is revoked.

The special damage in the sum of RM470 shall carry interest at 4% p.a. from date of injury to date of judgment. The award for pain and suffering and loss of amenities in the sum of RM4,000 shall carry interest at 8% p.a. from date of service of the writ to the date of judgment. The defendants are entitled to cost of this appeal and the costs of the hearing before the SAR are to be borne by each party.

Also found at [1991] 2 CLJ 1613